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In The
SUPREME COURT OF THE UNITED STATES

JAMES R. RUSHING, JR.
PETITIONER

Versus

LAWRENCE KELLY, Superintendent, and JIM HOOD, Attorney General of Mississippi

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

James R. Rushing, Jr.
Pro Se
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Meridian, MS 39301
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QUESTIONS PRESENTED FOR REVIEW

Brief Introductory:

James R. Rushing, Jr. argues the circuit court should have granted a Certificate of Appealability on the issue of insufficient evidence to convict of forcible/non-consent rape because on his direct appeal, the Mississippi Supreme Court should have reversed and rendered. He also argues that such a Certificate should have been issued on his ineffective counsel claims centering on counsel not utilizing the evidence available to destroy proof on the element of force/lack of consent, most of which were inconsistent statements and actions of the victim contained in part in medical reports and police questioning of the victim showing victim's exaggerated trial testimony of violence hours before the sex and failure to prove the long-term relationship of Rushing and the female beneficial to the female were of such a critical nature. Had counsel presented such evidence at trial a different result was probable, especially likely when considered in light of the trial testimony.

1. Whether a Certificate of Appealability should have been issued on the sufficiency of the evidence at trial and at the State post conviction collateral hearing because such evidence did show insufficient proof of the "force/no consent" element of forcible rape.

2. Whether a Certificate of Appealability should have been issued on the ineffective counsel claims because the claims show actual innocence and undermine confidences in the verdict of guilty.

PARTIES TO THE PROCEEDING

The Parties are identified in the caption.

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THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN A CASE MAKING A GOOD SHOWING OF INSUFFICIENT EVIDENCE AND ACTUAL INNOCENCE AT THE JURY TRIAL AND SUCH INNOCENCE AT THE STATE COLLATERAL RELIEF HEARING ON RECANTATION IF COUNSEL HAD PRESENTED AT TRIAL ALL THE EVIDENCE AVAILABLE, ALL THUS REQUIRING A CERTIFICATE OF APPEALABILITY

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Petitioner herein respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability entered in that Court on March 26, 2009, with reconsideration denied on April 29, 2009.

OPINIONS BELOW

The decision of the district court is not reported. The decision of the Court of Appeals is not reported. Direct appeal of the Mississippi trial court verdict and judgment is found in **Rushing v. State,** 753 So. 2d 1136(Miss. App. 2000), cert. den. April 27, 2000. Appeal of Mississippi Post Conviction after evidentiary hearing on victim recantation issue is found in **Rushing v. State**,873 So.2d 116 (Miss.App.2003), cert den. May 20, 2004.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals on reconsideration was entered on April 29, 2009. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America

Amendment XIV(Appendix, p. 4)

Amendment VI(Appendix, p. 4)

Anti-terrorism and Effective Death Penalty Act

28 U.S.C.A. § 2241 (Appendix, p. 4)

28 U. S. C. 2253(c)(1)(Appendix, p. 5)

28 U. S. C. 2254(d)(Appendix, p. 5)

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§ 97-3-65(1997 version)(Appendix, p. 6)

STATEMENT OF THE CASE

Proceedings Below

At the district court level, Rushing's Petition for Habeas Corpus was dismissed on the merits, without any hearing, when the district judge accepted the Magistrate's Report and Recommendation. That Report is in the Appendix at pages 8 - 41.

Magistrate's Report is an accurate history of the issues raised by Rushing on his direct appeal to the Mississippi Supreme Court, the content and issues of his State post conviction collateral relief petition, the issues raised on appeal to the denial of that collateral relief and the grounds for habeas corpus filed in the district court.

The Honorable District Judge by Judgment (Appendix, p. 7) on March 14, 2008, having accepted the Report and Recommendation of the Magistrate Judge dismissed the habeas petition with prejudice.

Rushing filed a Notice of Appeal which was treated by the district judge as Application for Certificate of Appealability which was denied and Rushing filed a Motion for Certificate of Appealability in the Circuit Court of Appeals. That Motion was denied by a single judge of that court on March 16, 2009(Appendix, p. 1) and reconsideration was denied by a panel of judges on April 29, 2009. (Appendix, p. 3)

The Motion for Certificate of Appealability was sought on insufficient evidence and ineffective assistance of counsel.

The Magistrate's Recommendation, at Appendix, p. 27, concluded that on direct appeal the Mississippi Court of Appeals(certiorari denied by Mississippi Supreme Court) had applied the same standard to the evidence as envisioned by Jackson v. Virginia, 443 U.S. 307, 319 (1979) and that the State court's decision was not an "unreasonable application of Jackson to the facts".

The Magistrate's Recommendation (Appendix, pp. 27-34), noting Rushing's state collateral relief petition had been rejected by the Mississippi Supreme Court without revealing the basis for rejection and adding that the Magistrate knew the state court applied Strickland v. Washington, 466 U.S. 668 (1984), concluded the evidence

presentation defaults of counsel were covered by the presumptions of competency and strategy and thus the State court's application of "clearly established" law of Strickland was not an "unreasonable application" of Strickland. As to the witnesses not called by Rushing's trial counsel, the Magistrate referenced how such claims were "disfavored" in federal habeas because speculation as to testimony.

As to Rushing's ground of "actual innocence", the Magistrate(Appendix, p. 38-39), limited that principal to the "gateway" to avoid procedural default. Herrera v. Collins, 506 U.S. 390, 400, 404(1993).

As stated earlier, the district court relied upon the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2254(d) (2002) language authorizing habeas relief only if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ." The Magistrate cited Robertson v. Cockrell, 325 F.3d 243, 247-48 (5th Cir. 2003) (en banc).

Though the Magistrate quoted both (1) and (2) of Section 2254(d), it never utilized subpart (2), which states:

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Rushing says that at the collateral relief hearing, limited to recantations of the victim, such subpart (2) should have been applied and it would have justified a finding of "actual innocence" and thus a hearing should have been held in the district court.

Sufficiency of Facts to Support Forcible Rape
Record at State Jury trial.

Here Rushing refers the Court to the trial testimony of Marilyn Lynch, which was quoted in the Opinion of the Mississippi Court of Appeals, Rushing v. State, 753 So. 2d 1136, 1152-1157(Miss. App. 2000) in state appeals Judge

Irving's dissent where he concluded that the rape conviction should be reversed and rendered, which dissent was joined in by Judge Thomas. The prose portion of Judge Irving's dissent relevant here is as follows:

> ¶73. Based on M.L.'s testimony, the most that can be said is that she apparently reluctantly consented at first but actively participated in the sexual encounter. Reluctantly doing something is not one and the same as being forced to do something. At no point did Rushing ever physically persist after being told "no".
>
> ¶74. The majority quite properly acknowledges that one of the elements of rape is that it must occur without consent and by force. The majority then attempts to explain that the State's proof satisfied this element. The majority, relying on Stewart v. State, 466 So. 2d 906 (Miss. 1985), reasoned that "proof that Rushing used additional contemporaneous force to have sexual intercourse with M.L. is unnecessary if the evidence establishes that she surrendered because of fear arising out of a reasonable apprehension of great bodily harm." I agree that this reasoning comports with the law in cases such as this. However, M.L.'s own testimony establishes that she consented not out of any apprehension of great bodily harm but out of a realization that Rushing would stick around a little longer until she did what he wanted her to do. The sexual intercourse occurred some six or more hours after the beating at the club. In the interim, M.L. and Rush had slept in the same bed without incident. It should be noted that when Rushing and M.L. returned to the trailer from the club, Rushing brought up the subject of having sex. M.L. told him she did not want to do so, and he and she both went to sleep. It was not until later that morning when he awoke and started making advances again that she finally agreed to his entreaties. The only logical conclusion, it seems to me, that a fairminded juror could draw is that these two lovers, with a five year

relationship, were simply making up, although M.L. had undeniably suffered what had been an unjustifiable and savage beating a few hours earlier. It is hard to extract any other conclusion from M.L.'s testimony in light of how they had sex and her concluding statements: "Well, after oral sex, I got on top of him and we had sex the way we usually do. Well we always had sex that way. I was always on top."

The majority of The Court of Appeals accepted the argument of the State that Lynch remained in terrifying fear as she slept with Rushing, talked on the phone with her friends, saw her son, Ray, as he left for work, all before Rushing awoke about 9:30 or 10:00(T 118, RE246) and started to sexually arouse Lynch, and during the interruption by the electric power meter employee Tom Johnson. The Court of Appeals disregarded Lynch's statement to Detective McElhenney that there was no sexual assault and took the position that the severity of the assault at the Club, as seen in the photographs of Lynch's body with its multiple bruises, excused new force or threat of it.

(Note: Explanation of code references to State Record: "T" refers to the jury trial transcript found in District Court Record(DCR)Volume II-12 and "H" refers to the PCCR Hearing Transcript, which is DCR II-7. "RE" when associated with a "T" number refers to the Record Excerpts on the appeal of the Jury Trial, found in DCR II-9; "RE" when associated with a "H" number refers to Rushing's Appellant Record Excerpts in the PCCR which are found in DCR II-5, pages 1-117 and DCR II-6 for pages 118-274; Lynch's deposition is DCR II-1).

At trial the only medical evidence was testimony(T137-143,RE268-274) of Nurse Paula Strickland on the rape kit session at Riley's Hospital ,Lynch returning to the E.R. after her 1 hour interview with Detective McElhenney, which ended about 11:15 A.M.(T154, RE262) (note: "T" refers to trial transcript while "H" refers to the PCCR hearing transcript.) The physical assault E. R. visit

was from 6:04 A.M. to 9:25 A.M., without mention of rape to the Doctor nor to Detective McElhenney when he had come over about 6:30. The medical reports(CP31,RE56), not even mentioned at trial, were Exhibit "B" of the State PCCR Motion for New Trial(CP1,RE26). The medical showed only one mark on her left temple(CP31,RE56) but Lynch testified(T61,83,RE189,211) Rushing hit her on the head many times. The medical reveals Lynch told Dr. Reinshagen she "passed out briefly 3 times." She told Detective McElhenney (CP31,RE56), she "lost consciousness" at the club and "then when I got home." (CP28,RE53)

Record of State Post Conviction Collateral Relief Proceedings

Rushing submitted to the Supreme Court his Motion for Leave to file a Motion for New Trial(CP1-24,RE26-49) on several issues, including ineffective assistance of trial counsel, but the Court only ordered an evidentiary hearing on the issue of recantation (CP173,RE91) because Lynch had given 2 affidavits, February 26, 1998(CP47,RE72) and October 3, 2000(CP55, RE80), and a deposition (RE118) attended by her own counsel, where she denied a rape had occurred and admitted she had lied and exaggerated the circumstances. After state postconviction evidentiary hearing was ordered on recantation, the District Attorney, Hon. Bilbo Mitchell, obtained an Affidavit from Lynch (CP174,RE92) dated August 20, 2001, which purported to explain her July 26, 2000 recantation deposition.

At the hearing on September 19, 2001,admitted into evidence were various Affidavits of Lynch: February 26, 1998(RE116), October 3, 2000(RE159), October 17, 2000(RE162), August 20, 01(RE164), and her deposition. A video (RE161) of that deposition is in the state court record and Rushing urges the Court to view the same for content and credibility.

Lynch was subpoenaed by Rushing, but since the D.A. had brought Lynch into his office, purportedly on August 16 and August 20, 2001, and she had reaffirmed

her trial testimony, and refused to talk to post conviction counsel, William Waller, Sr., Mr. Waller didn't call Lynch to testify. Neither did the D.A. Mitchell. During direct examination, the D.A. objected to hearsay statements of Lynch. After the judge established that Lynch was in the courthouse and available(H20-21), he allowed Mr. Waller to ask Holt, Attorney Williams and Rushing about what Lynch had told them. The trial judge disallowed testimony about the trial evidence.(H23-25, 28,29) When Rushing attempted to introduce love letters(RE103-113) from Lynch to Rushing in prison, after the conviction, objection was sustained at H26-27. At H 31, Mr. Mitchell, asking Rushing whether his friends had been calling and pressuring Lynch, said: *"You will hear that when she testifies later.* Are you aware she came into my office and when I had to ask her about this that tears came to her eyes and she cried again about you raping her?" At H 91, the court again sustained objection to the love letters saying *"She can testify about them herself,"* whereupon Mr. Waller wasn't allowed to explain why he wasn't going to call her, nor to make a proffer.(H92). During direct of the D. A.'s Investigator Louis Robbins, hearsay objection to Lynch's statements at the D.A.'s office was first sustained, but after Mr. Mitchell remonstrated that Mr. Waller had been allowed to give Lynch hearsay, objection was overruled.(H93-94)

In an Order Denying Motion for PCCR(CP211,RE6), Judge Bailey revealed he had made "a full examination of the Motion, together with all the files, records, transcripts and correspondence, argument of counsel and briefs of the parties."

The state trial judge, in relevant part, gave his Opinion:

> This court has considered the trial testimony of the victim, along with her recanted testimony contained in the affidavits submitted and the deposition taken, as well as the affidavit she provided to the District Attorney. The Court is confident that she testified truthfully at trial and in her affidavit made on August 20, 2001. The victim ***stated in her affidavit*** that she was tired of the calls she was

> receiving and that she could not live with herself if she did not tell the truth. The court is also of the opinion that the victim bent to pressure from the petitioner and others in recanting her trial testimony. This court does not know ***what the victim would have stated*** had she been called to testify at the evidentiary hearing and will not speculate to ***what she might testify***. The court is of the opinion that(CP217,RE12) the recanted testimony is material, but that ***because the victim has now stated*** that it was in fact rape, along with her reasons for recanting her testimony and ***because she did not testify at the evidentiary hearing***, the petitioner has not proven that a different result would be reached if a new trial were provided. Therefore, the motion for new trial is hereby denied.(CP218, RE 13) (writer's emphasis and, note, all emphases hereafter are those of the writer.)

Because the Judge had allowed Lynch's statements at the August 2001 affidavit session at the D.A.'s office but the D.A. had not called her, Rushing filed a motion for Reconsideration (RE93,CP219) and Attorney Williams, resuming representation of Rushing prior to the reconsideration hearing supplemented the record with his post-hearing Affidavits from Lynch(RE165), Attorney Leslie C. Gates(RE174), Eddie Holt(RE172), appeal co-counsel Ross Barnett, Jr.(RE176) and Mr. Waller(RE168). The Judge, remarking(H123) that he could not have called Lynch to testify, refused to allow the affidavits, exclaiming that the trial photographs showed "he beat the ever living Hell out of the victim".(H128) Attorney Williams, Eddie Holt and a notary went to Lynch's home on February 13, 2002 and she signed an affidavit saying there was "no rape" and adding in her own handwriting "There was no force". On December 12, 2001, Williams had taken Attorney Gates with him to Lynch's home and Gates' Affidavit(RE 174) reflected Lynch said she made only one visit to the D. A.'s., adding she was not intimidated and the deposition, trial testimony and her August 2001

Affidavit were all true. Lynch told Williams and Gates that Rushing did not force her to have sex and she didn't tell the Police Rushing forced her. The Police wanted to charge rape. She didn't. Right after the September 19, 2001 hearing Eddie Holt (Affidavit RE172) visited Lynch and, when Holt told her they said she had been to the D.A.'s office twice, she said, "them folks lied". However, on February 13, 2002, Lynch refused to sign an affidavit to that effect. Rushing's Affidavit showed why Mr. Waller did not call Lynch to testify.(H123, RE 167) Lynch had told Rushing she would not go to jail for anybody; not do anything to hurt her or her children and had refused to speak to Mr. Waller. At the hearing, Mr. Williams pointed out(H128) that Lynch had not cried at the trial, which was not contradicted. The Judge(H128-129) said the jury verdict was based on physical evidence(H129), thus the photographs, these being the only such evidence.

Critique of PCCR Hearing Testimony/Exhibits

The testimony at trial and PCCR on the sex was all words. Every word spoken and each phrase carries more weight and truth than revealed on the surface and by a cursory reading. Two examples pregnant with the truth are: (1)during the McElhenney interview(CP28,RE53), Lynch, when asked, "Did he detain you ***against your will*** last night?" answered: "***When we were at the club, yeah.***" and (2)in Lynch's August 20, 2001 Affidavit she admitted she was "feeling a little guilty for Mr. Rushing". The judge found Lynch was "pressured" to give the recantation affidavits and the July 2000 deposition, but the word "pressure" is not in the D. A.'s affidavit. The affidavits at reconsideration contradict the two-visit testimony and undermine the free-will character of the D. A.'s August Affidavit.

The PCCR Exhibits

Exhibit "A" was the Detective McElhenney interview with Lynch and internal Police Memos, both of which the trial jury did not see. The interview is quoted here(CP28,RE53), starting with McElhenney's question "Did he sexually assault you?":

Q. ***Did he sexually assault you?***

A. No.

Q. ***Did you ever loose consciousness*** at any time while you were ***in the Club?***

A. Yes, and twice when I got home.

Q. What did he hit you with?

A. To me it looked like the big end of a pool stick that was broken.

Q. Did you ever at any time ask or try to leave the Club?

A. He was not going let(sic) me go. He told me that he was going to beat me until he was satisfied, then he was going to take me to the hospital and then coming(sic) to make his bail.

Q. What time of gun did he threaten you with?

A. It looked like a .357 with a long barrel.

Q. Where does he keep the gun?

A.He got it from underneath the cash register last night.

Q. Where did the stick come from?

A. Under the counter, under the bar.

Q. Did he detain you against your will last night?

A. When we were at the Club, yeah.

Q. Did you try to defend yourself against him?

A. Yes, I did. Every time I threw my hand up, he said that he would hit me in the head.

Q. Do you wish to sign charges on James R. Rushing?

A. Yes.

(***Note: Some space occurs at this point in the Exhibit***)

Q. Do you have anything else that you want to add?

A. Back to that sexual assault question, well, he asked me did I feel like fucking, and I told him no. ***When he helped me back into the bed***, he started feeling on me and stuff. Then he went to sleep. When he woke up this morning, he asked me did I feel like fucking and I told him no. ***I pushed his hands off of me and he stopped.*** Then he turned back over and told me that he was going to fuck me before he left ***even if it was the last time. Then we had sex***. I stopped and he said "don't be

half fucking me." He asked if I really didn't want to do it and I told him no. He started playing with my vagina and I pushed his hand back and ***he told you to stop. So after that I performed oral sex on him.*** He was pushing my head down. ***Then we had intercourse.*** He wanted to have anal sex but I told him no and we did not do it. ***He was trying to stick his penis in my anal(sic) and I told him no.*** He told me that I have go to cum somewhere. ***We had vaginal sex.*** I was on top and he ejaculated in my vagina. He then went to the bathroom and he washed up and then put on his clothes and said that he was fixin(sic) to go. He then left.

At trial the above extra space was not even mentioned though McElhenney's separate memo(CP30,RE55) says: "During the statement of Marilyn Lynch ***I found out that a rape had also occurred***". That surely is the reason for the *extra space.* Then he contacted Lieutenant Johnson, to help interview Lynch about the sex.

Exhibit B was the medical records on the assault examination done between 6:04 P.M. and 9:25 P.M.(CP31,RE56) and the rape kit (CP35,RE60)done from 11:20 to 12:41. Significantly, Lynch at the assault exam told Dr. Gerald Reinshagen she had "passed out briefly three times." Returning to the E. R., Dr. Reinshagen reports: "(Lynch)states was assaulted by the father of her child and he penetrated her vagina with his penis and ***attempted to penetrate her rectum.***" Triage assessment shows: "Pt. was assaulted earlier by ***'by the father of my child'*** early tonight. Then went to police station and told police that ***'he attempted to have anal sex with me'*** and I refused." Dr. Reinshagen's Diagnostic Impression was ***"alleged rape"*** with "***No signs of trauma in vaginal or anal area***. At 12:20, the Nurse's Notes reflect "...***crying but calm, complains of being sore all over."*** Lynch, after the E.R. assault visit, was only told to take "Advil for pain relief", but, after the rape kit, she was prescribed 800 milligram Motrin. **Exhibit "C"** was Tom Johnson's affidavit who testified at the evidentiary hearing.(H85) **Exhibit "D"** was Lynch's Affidavit(CP47,RE72) given to Attorney Ross Barnett, Jr. in her home on February 26,

1998. She struck out the typed parts that said (1)she didn't pass in and out of consciousness, (2) he didn't hit her on the head, (3)that he was merely "paddling her" and (4)that he hadn't pointed a gun at her. Lynch wrote in: ***"I have had time to think back on things that happened that night and I may have overstated some. I want my son to get to know his father."*** The typed conclusion said: ***"I said a lot of other things at trial to make a strong case against James Rushing. I should not have done this."*** In that Affidavit, Lynch contradicted her trial testimony by swearing: (1)He did not hit her to cause serious injuries; (2)the sex was by consent and voluntary;(3) he did not make her take clothes off; (4) she stumbled to the floor (5) she didn't need any help and (6) she was not afraid of Rushing. **Exhibit "E"** and **Exhibit "F"** not relevant. **Exhibit "G"** is the October 3, 2000 Affidavit of Lynch((CP 55, RE80), saying that after getting rid of Tom Johnson, ***"I got back into bed and continued to make love to James for the next hour"***. **Exhibit "I"**, Affidavit of Terry Collier(CP99, RE83), close friend of and first to see Lynch at the trailer about 4:00 P.M., swore Lynch ***"had "never conveyed to her that she had been raped."***

The Lynch August 20, 2001 Affidavit given in the D.A.'s office, is as follows:

> I, Marilyn Lynch, having been duly sworn, do affirm that the testimony I gave in the trial against Mr. Rushing was the truth and **happened as I stated it.**
>
> The **deposition** I gave to Mr. Rushing's attorney was given **because I was feeling** sorry and **a little guilty for Mr. Rushing**. I was tired of all the phone calls I was getting day and night just about every day until my phone was turned off. **His friends were** always asking why I did it and **trying to make me feel bad**. But **after thinking long and hard** about it, **I couldn't live with myself if I told a lie** and changed my testimony. **At least now I still have my self-respect and dignity** for sticking with the truth.
>
> **I'm sorry for any** inconveniences or **problems I**

may have caused anyone for giving that deposition.

The PCCR Hearing Testimony

Lynch's Deposition was admitted without objection(H44), Exhibits 6 and 8(video). She bruised easily, from just leaning on her elbows on the table.(RE127-128) At the club they "got in a fight".(RE128) She hit Rushing with her hand, got the stick, didn't hit him and, as he took it(RE129-130) they tussled and she fell to the floor.(RE130) She refused a cab and he took her home.(RE131) Rushing asked for sex after they got in the trailer and she said "No". They went to sleep in the same bed.(RE134-135) The telephone was on the dresser about ten feet from the foot of mattress(RE135) and after 7 a.m. either her sister Nonie Hall or her son's ride called. Her friend(Terri Collier) called and Nonie called again and may have awakened Rushing.(RE137-138) Ray left about 8:00 and Rushing started touching and rubbing her. She told him she didn't want to but he kept on and so, "we had sex."(RE141) After Tom Johnson, "we went back and we continued having sex."(RE142) About the Detective McElhenney interview:

> "And then they asked me was there any sexual–did we have any sexual–-I told them yea, we had sex. ***And they asked me did he force me. I told them no he did not force me.*** And that, you know, I had sex with him because I wanted to have sex with him. And I told them he did not force me to have sex. And I did not tell them that he raped me....***they kept asking the people when I went to the emergency room*** was there –had they done any x-rays, ***was there any ones broken*** or anything like that. And when they–and ***when I went to give my statement,*** I had ***my finger was broken. And they said they were going*** to ***charge him with aggravated assault, because of the broken bone.***(RE143)...And ***then one of the detectives,*** I don't remember, ***made the statement*** to the effect that, well, if we can't get him for what we want him for, ***we'll get him for whatever we can.***"(RE144)

She swore the sex was by consent.(RE146-147) Because Nonie and Ray wanted to get guns and go after Rushing, Lynch pressed charges.(RE150-151) As for the sex, ***"It was not forced. It was not – it was regular sex the way we usually have sex....No, we ain't have no oral sex....***(RE152) She re-affirmed her February 26 affidavit that the injuries weren't such to make it aggravated assault. About the deposition, she said,

> ***"I am doing this on my own." "I was not forced, coerced or, threatened in any kind of way to make this deposition."*** (RE144)...(Asked whether she wanted to add anything,) ***"No, I just wanted to do this. Everything I am saying is true. And I want to make definite that they know that I was not forced, coerced or threatened in any kind of way to make this deposition. And I am just doing it to set the record straight."***(RE155)

There is substantial evidence that the trial testimony of no consent sex was a lie and the recanting affidavits and the solemn deposition are the truth. Lynch's interview by Detective McElhenney shows it, enlightened by Lynch's deposition that the police converted consensual sex into a rape. The medical evidence and the interview show Lynch "passed out briefly three times", once at the Club, once at the door of the trailer as shown by Lynch's trial testimony and once as she went to the bathroom and returned to Rushing's side in bed. The medical shows only one mark on Lynch's left temple, not, as she testified, multiple hits to the head and knots all over her head. The medical shows no bruises from "stomping or kicking". The pain at the rape kit E.R. visit at 11:00 A.M. whereby Lynch got a prescription for Motrin 800 milligrams, is exaggerated, since at the 6:04 to 9:25 A.M. assault E.R. visit, she was only advised to take Advil. Lynch's deposition shows she bruised easily, just from her upper body weight as she rested her elbows on a table. Immediately beginning to recant the trial testimony by an Affidavit taken by Jackson Attorney Ross R. Barnett, Jr. on February 26, 1998 Lynch compromises the weight of the evidence, when she in her own handwriting and as typed at the end, said she exaggerated the facts at the trial. This

February Affidavit was given to the D.A.'s office in the Spring of 1998. At the July 26, 2000 deposition, she again recounted that the sex was by consent and that a rape charge was the creature of the Detective. On October 3, 2001, Lynch signed another Affidavit saying the sex was "love making", which she resumed after getting rid of electric power man Tom Johnson who knocked on the door about 11:00, Rushing having awakened at 9:30 or 10:00 to resume his foreplay and requests for sex. At the trial, on re-direct of McElhenney, the assistant D.A. solicited perjury and misrepresentation of fact from McElhenney that the time was short between Lynch's "No" to the question of sexual assault and Lynch's response to "do you have anything else to add", whereupon Lynch goes into what is clearly consensual sexual details. Intervening between these two questions, was McElhenney's personally incriminating remark that during the interview he "found out a rape had occurred" and the usual terminal question to a police victim interview did Lynch want to press charges for the assault.

Lynch had been neutralized as a witness for Rushing by the August D.A.'s investigation of her perjury, which produced her ambiguous affidavit, where, she admits she was "feeling a little guilty" for Rushing, which admission this Court should be compelled to conclude is guilt of her false testimony as to no consent sex. Though throughout here the "perjury" is attributed to Lynch alone, as we glimpse through the record, the ugly specter raises its head that Detectives McElhenney and Johnson suborned any false swearing by Lynch at the trial. This is first seen in McElhenney's admission that he "found out a rape had occurred"(CP30, RE55). It is confirmed in Lynch's deposition testimony that the Detectives wanted to make the sex a rape case.

Contradictory Accounts of Severity of Injuries

The medical reports, not even mentioned at trial, when compared with Lynch's trial testimony, prove how Lynch lied about the head injuries and that she was passing in and out of consciousness all the next day, told the nurses upon the return for the rape kit session she had

told the police Rushing had tried anal sex but then desisted when she complained, and wanted everyone to know Rushing was the father of her child. Because the Judge admitted at the reconsideration that he had taken the time(H128) to examine the photograph exhibits from the jury trial (H128) then Rushing here makes a few remarks about the weight of those photographs. The photographs show a horizontal bruising across the upper portion of the buttocks to their joinder with the lower back. Of course, there are bruises on back of both the forearm and upper arm of her left arm, maybe warding off head blows. Any bruises must, in all fairness, be re-examined in light of Lynch deposition testimony that merely resting on her elbows on a table caused her to bruise. Nurse Strickland's testimony as to the bruises does not support Lynch's trial testimony of the assault. Neither did the Catscan.(CP42, RE67) Lynch testified at trial (T83):

> " had knots in my head, and **this arm** here was swollen and bruised up. My hand was swollen. my finger was broken on **this hand** and this hand was bruised and swollen, too. And all my entire backside was bruised up, and I had bruises in my side, bruises around my neck. And I was, just a lot of bruises that I had on me."

E.R. Nurse Strickland (T142-143(RE271) only saw bruises on her buttocks and her arms, one on her right side of her neck, center way of her neck which was a mark or a bruise, but not an abrasion. In the medical reports(CP32, RE57) Nurse Williamson, RN at 5:55 p.m. wrote "...with complaints of pain to the left arm, left thigh, ***left side of head***, complete buttocks, right hand, right neck." The medical report has only one entry on head injury: "small scalp contusion left parietal area".(CP37, RE62)

Notably, though Lynch testified to all the pain so much that Judge Bailey at H 129 exclaimed that Lynch was beaten so badly she could not even sit down, Dr. Reinshagen at the first E.R. visit where no rape was mentioned, only told Lynch to take Advil. Only when she returns about 11:15 p.m., after McElhenney (CP30, RE55)"found out there was a rape", does Lynch fabricate

enough pain for the Motrin. Was her pain increasing or her fabrication of rape demanding pain medicine to corroborate false pain? Officer B. T. Prichard's report(CP26 RE51) reflects Lynch told him she had been beaten in the head several times. Lynch fabricates head injuries to corroborate the intermittent and persistent "passing out" to deceive the jury away from the obvious conclusion from her words to McElhenney and at trial that she consented to the sex.

Factual Distortions by District Attorney Witnesses.

At the state postconviction hearing, in an intentional "credibility" ruse, the D.A. represented that Lynch hadn't been brought in and just signed the affidavit right there. But he and his staff, creating an impression of free will, tried to persuade the judge that Lynch took a paper tablet home and drew up her own statement. Now through the reconsideration affidavits, Lynch has torpedoed that contrivance. She adamantly told Holt she went only once to the D. A.'s office.

While we are on the subject of misrepresentations and contrivances, the effect of these on the trial judge was substantial. An example is the crying. First, the Judge never mentioned anything about Lynch crying. Faced with the crying in his office, Mr. Mitchell attempted to thwart the natural inference that Lynch cried because she had committed perjury at trial, by misrepresenting she had cried at trial. Victim advocate Shirley Adams gave two reasons why Lynch cried: "(S)he was upset, I guess, about the calls that she had been getting and all the other stuff that had been going on with her, I guess, with her son and different things like that."(H112) Criminal investigator Louis Robbins, admitted he didn't know why she was crying, while allowing she was crying because she had given her recanting sworn statements and the deposition. Strange is that the trial judge does not elaborate or mention Robbins' testimony and the question must be asked was this because Robbins says she was very upset, crying during the whole interview. In fact, Adams says Lynch wanted to go home and make out the statement

because she was very upset, but the Judge disregarded this "crying" and at CP 215, RE110 wrote: "Ms Adams stated that Ms Lynch requested that she be allowed to go home and write out her own statement, which she did." Given the judge says that Adams said Lynch was upset from calls from Rushing's friends, but it was not Adams(H112), but Robbins and he said(H96): "tired of receiving anonymous phone calls and messages from his friends". Another conflict between Robbins and Adams and a reason for the Judge to not refer to Robbins is in actually what Lynch was asked and agreed to do. Adams said (H107)actually first they "asked her to make a–to write out a statement, basically, saying what she had told us when we were talking to her in your office," however, Mr. Mitchell immediately corrected Adams: "Did we not actually ask her to give us a statement of what had actually happened?" Robbins, on the other hand at H97 described it differently: "We asked her would she give a statement. In fact, you asked her would she give a statement to the effect of which one was the truth as far as the deposition and the trial testimony." Judge Bailey(CP 214-215,RE9-10) said that "She(Adams) testified that they only asked her what was the truth. ...Ms Adams stated that Ms Lynch requested she be allowed to go home and write out her own statement, which she did." Robbins' testimony, it is respectfully submitted, was intentionally disregarded by the Judge because it was substantially and materially contradictory to Adams' and revealed how pressured Lynch was at the D.A.'s office. There is no doubt the interrogation was so intimidating it generated the final August Affidavit. The above machinations of the truth surrounding the D. A.'s session with Lynch surely explain why the trial judge himself was convinced that Lynch was not credible, but the judge likewise should have been convinced the August 2001 Affidavit was coerced.

Mr. Mitchell, fearful of Lynch's testimony because he had coerced the August Affidavit, and, without Lynch to contradict him, did a yeoman's job in groundlessly amplifying and distorting Lynch's August 20, affidavit. The examples are numerous: (1)Mitchell asking Rushing on cross at H30 was he even aware "***your friends had been***

calling her and putting pressure on her to lie about this?"; (2) asking Rushing at H33, and, misrepresenting it is respectfully submitted, "did you know she came into my office and said she had received so much pressure from your friends that she felt like it was something she had to do"; (3)asking Rushing at H34, " ***Do you know*** how many of your friends have influenced her?"; (4)asking at H35, "How many of your friends or family members or colleagues have pressured her to change her testimony that she gave at trial?" and (5)(H36) had pressured Lynch into "thinking that a rape was something other than what everybody knows it is"; (6)at H 38, asking Rushing did Lynch ask him to get his friends to quit bothering her and whether she was ever offered anything to change her testimony; and (7)questioning at H39-40 whether Lynch in her February 1998 affidavit was trying to recant "that you beat her".

Mr. Fortenberry, the Assistant D. A. who tried the original indictment, without any tears from Lynch at trial for his final argument, was left only with the elusive word "fear", to dispel the jury's concern that Rushing made no threats, used no force, and consistently yielded to Lynch's denial of sex and yielded to her discomfort from the attempted anal sex.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN A CASE MAKING A GOOD SHOWING OF INSUFFICIENT EVIDENCE AND ACTUAL INNOCENCE AT THE JURY TRIAL AND SUCH INNOCENCE AT THE STATE POSTCONVICTION RELIEF HEARING ON RECANTATION IF COUNSEL HAD PRESENTED AT TRIAL ALL THE EVIDENCE AVAILABLE.

The Fifth Circuit Panel's denial of a Certificate of Appealability should be reversed for the following reason:

The Fifth Circuit Panel had sufficient compelling evidence omitted at trial that was the fault of trial counsel that showed actual innocence of forcible/no consent rape thus requiring issuance of a Certificate on ineffective assistance of counsel and insufficient evidence to convict. Thus the district court was in error in dismissing the habeas petition.

In General

The COA should be granted if Rushing makes "a substantial showing of the denial of a constitutional right" by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

The COA question "is a threshold inquiry only, and does not require full consideration of the factual and legal bases of [the petitioner's] claim." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The Magistrate in his Report and Recommendation (DCR pp. 151-181) set forth the standard for habeas relief, as next stated, but misapplied it. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-32, 110 Stat. 12144, in Title I modified 28 U.S.C. § 2254 and set the following standard:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, where the state court adjudicated the petitioner's claim on the merits, this Court reviews questions of fact under § 2254(d)(2). Rushing contends here that, when the PCCR proceedings, testimony and exhibits are fairly considered, it is obvious that the State courts were unreasonable in determining the facts from the evidence that was presented. The facts at the PCCR have been critiqued, along with the Exhibits *supra*.

Questions of law or mixed questions of law and fact are reviewed under §2254(d)(1). A state court decision is "contrary to" federal law if it is dependent upon principles of law which directly conflict with prior Supreme Court holdings, or reaches a different conclusion than that reached by the Supreme Court on materially indistinguishable facts.

An "unreasonable application" by a state court decision is where the court "correctly identifies the governing legal principle" but then "unreasonably applies it to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Rushing contends that this is the case of the ineffective assistance claims. There can be only little doubt that had the evidence presented through the habeas been presented and the cross examination been pursued a different trial result would have been obtained. Rushing contends that the State court's conclusions are "objectively unreasonable" and habeas relief is justified, therefore a COA should have been granted. Rompilla v. Beard, 545 U.S. 374, 380,125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005).

Rushing contends he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); Slack, *supra*, 529 U.S. at 483, 120 S.Ct. 1595.

Rushing has demonstrated that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El, *supra*, 537 U.S. at 336, 123 S.Ct. 1029 (quoting Slack, 529 U.S. at 484,

120 S.Ct. 1595). The "factual review" generated disagreement in the Mississippi Court of Appeals. State PCCR Judge Bailey himself said he did not know what Lynch would say at the hearing. In part this could just as well have been because of her statement to Detective McElhenney that no sexual assault occurred. This could be because she said that she was not "restrained" at the trailer. Objectively the evidence of the comings and goings of her son and the utility man at the trailer, support this statement by her. There is no substantial doubt that the sex was consensual and purposeful by Lynch to restore the beneficence of Rushing.

The methodology of determination of the request for a COA "requires an overview of the claims in the habeas petition and a general assessment of their merit." *Id.* In Williams v. Taylor, 529 U.S. 362,389, 120 S.Ct. 1495,1511, 146 L.Ed.2d 389(2000) Justice Stevens analyzed the AEDPA and said:

> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody-or, as in this case, his sentence of death-violates the Constitution, that independent judgment should prevail

Justice O'Connor, *ID.* 411, 120 S.Ct. at 1522, in Part II of her opinion, joined by Chief Justice Rehnquist, Justices Kennedy, Thomas and Scalia, , after confirming that though Congress did not define "unreasonable" as it modified application, all members of the "legal world" knew what reasonable was and she wrote:

> Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its

> independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Here, the facts before the district court and the state courts surely support a conclusion of "unreasonable".

The *AEDPA* requires that factual findings are presumed to be correct and thus Rushing has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. 2254(e)(1). Rushing contends that he has done such. There is no basis to conclude that the trial counsel made a "strategy choice" not to reveal and use all the evidence that Rushing has now put before the Mississippi Courts and the District Court. The rebuttal of "correctness" is achieved by the degree of "unreasonableness" when all the facts are incorporated into a determination of the conclusion.

Insufficiency of the Evidence to Prove Rape.

The pertinent law on this issue is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Upon the appeal of the original conviction, the Mississippi Court of Appeals was clearly erroneously that the state law of Stewart v. State, 466 So.2d 906 (Miss.1985) should apply, it being quoted as follows:

> The well-settled rule is that in a prosecution for rape, physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm.

Rushing adopts the analysis and conclusion of the two dissenting state appellate Judges in the Opinion rendered by the Mississippi Court of Appeals and shows how true

their conclusion was. The affidavits, missing Detective McElhenney's investigation statement from Lynch, missing ER records and Lynch's recanting Affidavits and deposition and the D. A.'s affidavit all now show innocence. The findings and conclusion of the State PCCR judge have been meticulously dissected and critiqued in light of the testimony of the D.A.'s witnesses surrounding what occurred during the D. A.'s getting the Affidavit from Lynch.

The medical reports and PCCR proof dispel any support for "drifting in and out of consciousness" and denude of any force the following quote from the State court opinion that the most important evidence of yielding to threat of force was:

> ... she (1) denied having engaged in consensual intercourse, (2) stated that Rushing had, "beat me half senseless", and (3) stated her belief that Rushing would not leave her alone or leave her, until he had intercourse with her.

As the two Mississippi Court of Appeals Judges pointed out, Lynch and Rushing were making up for Lynch's failure to pay the bills and Rushing's assaulting her for that.

The Honorable Magistrate Judge was wrong, it is most respectfully submitted, when he concluded at page 16 of the Report and Recommendation(Appendix, pp. 27-28) that the issue was just a credibility one, such conclusion totally in disparity with the evidence clearly presented at the state PCCR hearing and the Exhibits thereto.

Ineffective Assistance of Counsel.

The Honorable Magistrate Judge, it is respectfully submitted, has erroneously concluded as to the magnitude and gravity of the counsel's errors that went to substantial proof or defense of the elements of the crime charged.

Rushing argues that the "totality of the circumstances" shows he did not have effective counsel and the omissions and errors were not strategic choices. Such actions contended below that counsel should have taken all point to the correct strategy in mounting a defense to the Indictment.

As the Magistrate pointed out the Mississippi Supreme Court rejected the ineffective counsel claims just saying they were without merit and saying that court surely applied the standard set forth in Strickland v. Washington, Strickland v. Washington, 466 U.S. 668,104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the "clearly established" law for claims of ineffective assistance of counsel. Under Strickland, both a deficiency and prejudice prong must be satisfied, which when met proves the adversarial process was so lacking that it rendered an unreliable result, thereby denying a petitioner a fair trial. See *Id.* at 687. There is a presumption of "reasonable professional assistance" , which requires Rushing to show his defense was so prejudiced that there is a reasonable probability that without those errors Rushing would not have been convicted. See *Id* at 689-694 (holding a "reasonable probability is a probability sufficient to undermine confidence in the outcome").

It defies "reason" that the failures of counsel on presenting evidence of innocence, first by contradictory solemn statements by Lynch and independent basis in fact for consensual sex to renew favor with Rushing for material benefits of a home and expenses were reasonable trial strategy.

Rushing respectfully submits he has shown that counsel was not prepared and that his actions were not the result of a reasonable trial strategy. See *Id.* at 689 He contends the detailed outline above of the Insufficiency of the Evidence shows clearly trial counsel was not "objectively competent".

The Strickland test "of necessity requires a case-by-case examination of the evidence," Wright v. West, 505 U.S. 277, 287, 308, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)(KENNEDY, J., concurring in judgment). The district court did not fully consider the detail and weight of the evidence in light of the "totality of the circumstances" of the trial.

The failures of counsel listed by Rushing all would have led to a verdict of "not guilty". Those counsel failures are that he : failed to obtain and use police reports, rape kit, emergency room records as well as a statement by the

victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to introduce information regarding the paternity of victim's child. The Magistrate spends time on the "rape kit", but better to have spent time on the total E. R. Reports and Detective McElhenney's interview, for they show minimum unconsciousness, and no force or restraint at the trailer and critically, Lynch saying there was no sexual assault. Additionally, the E. R. report does not show, contrary to the Mississippi Supreme Court's opinion on direct review that Lynch was "stomped and chocked". There was only a red mark on side of her neck, not bruise, but red mark and bruises on her buttocks and forearms, surely from the pool cue. The physical conflict was exaggerated and purposefully so and trial counsel failed to contradict Lynch through her own solemn words at the E. R. and more pointedly her statement to the Detective.

The Magistrate Judge cites the presumption strategy choice where the record is silent as stated in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Such presumption is rebutted here.

Without a severance of the aggravated assault count from the forcible rape count, trial counsel knew the club assault would be used to show some force on Rushing's part as a basis for the rape. Lynch's testimony of severity of that assault should have been revealed as exaggerated through use of the ER reports and her statements therein. She was not beaten severely about the head. Detective McElhenney's report where Lynch distinguished that she was only restrained at the Club and not at the trailer is of great weight, nearly determinative, that the Club assault did not bleed over into the bedroom several hours later. "Not retrained" means free. Free to talk with her son, free to leave with him, free to leave with the utility worker.

Likewise, in supporting consensual sex, trial counsel should have clearly proven the relationship, the question of the paternity of the child and the benefits flowing to Lynch of a free furnished home had she been successful in mending the relationship through a *quid pro quo* of sex.

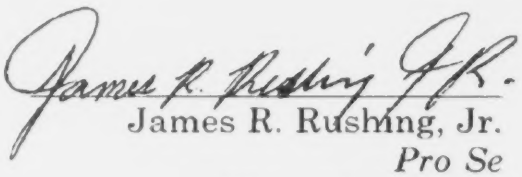
Calling the ER doctor and the utility worker would have shown the conniving nature of the purported rape.

Though the Magistrate cites a rule that uncalled witness complaints are not favored in habeas corpus because their testimony is largely speculative, per McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir.1986), the ER doctor and the nurses were credentialed professionals and the utility worker would have described Lynch's demeanor and deportment.

The McElhenney report, the lack of "restraint" and Lynch's admission at the hospital, when initially asked about a possible sexual assault, and answering in the negative, all support a conclusion that counsel's failures were not "strategy" but had they not occurred, Rushing would never have been convicted.

CONCLUSION

Petitioner Rushing urges the Court to reverse the denial of a Certificate of Appealability on the claims identified and remand for allowance of the appeal before the Fifth Circuit Court of Appeals.



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